

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Notice of Market Dominant
Price Adjustment

Docket No. R2018-1

US CHAMBER OF COMMERCE
MOTION FOR LEAVE TO COMMENT ON THE POSTAL SERVICE'S
ANSWER TO CHAIRMAN'S INFORMATION REQUEST NO. 6
(November 1, 2017)

The U.S. Chamber of Commerce (Chamber) respectfully requests leave to file an attached comment on the response of the U.S. Postal Service (USPS) to the Chairman's Information Request No. 6 (CHIR No. 6), filed on October 27, 2017. In its response, USPS provides additional information relating the legal and factual bases for rates proposed in this proceeding. This information was unavailable to affected parties prior to the October 26, 2017, deadline for filing comments on the proposed rates.

Respectfully submitted,



Sean Heather
Vice President
Center for Global Regulatory Cooperation

U.S. Chamber of Commerce
1615 H Street NW
Washington, D.C. 20062-2000
202 659 6000
SHeather@USChamber.com

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Notice of Market Dominant
Price Adjustment

Docket No. R2018-1

US CHAMBER OF COMMERCE
MOTION FOR LEAVE TO COMMENT ON THE POSTAL SERVICE'S
ANSWER TO CHAIRMAN'S INFORMATION REQUEST NO. 6
(November 1, 2017)

The U.S. Chamber of Commerce (Chamber) respectfully submits the following comments on certain points raised by the response of the U.S. Postal Service (USPS) to the Chairman's Information Request No. 6 (CHIR No. 6).¹

1 USPS has provided no public data in support of its proposed rates for Inbound Letter Post.

In its response to CHIR No. 6, USPS filed a new library reference, USPS-LR-R2018-1/8, which gives public access to certain data supporting its proposed rates for *outbound* international *document* services. USPS has provided no publicly available data in support of its proposed rates for Inbound Letter Post, and in particular *inbound small packet* (also called E-Shape Volume) service, the product which is the main focus of concerns raised by the Chamber (and seconded by PostCom).

The Commission has not yet responded to the Chamber's motion to unseal all of USPS-LR-R2018-1/NP1. To facilitate the Commission's decision and meet the major objections of USPS, the Chamber declares that it has no objection to redaction of all data relating to competitive products and all country-specific data which is unnecessary to calculate the revenues resulting from the separate rate schedules for Inbound Letter

¹ "United States Postal Service Response to Chairman's Information Request No. 6" (Oct. 27, 2017).

Post.² The Chamber also understands that Inbound Letter post rates are used for the basis of negotiations with both public and private postal operators and that any release should not jeopardize the commercial interests of USPS partners.

2 USPS has not shown how the United States is bound to the terminal dues provisions of the 2016 UPU Convention.

Question 2(a) of CHIR No. 6 asked USPS "What is the legal basis for the statement that changes in rates for Inbound Letter Post are "outside the Postal Service's control?" In response, USPS talks around this issue but does not directly answer the question. USPS appears to imply that the U.S. government and USPS are legally bound to implement the 2016 UPU Convention because either (1) the U.S. has ratified the UPU Constitution and Article 22(3) of the Constitution "obligates all UPU member countries to abide by the terms of the Universal Postal Convention" or (2) "State Department officials, acting with delegated authority from the Secretary of State, concluded the Universal Postal Convention to take effect in 2014 and 2018 by signing the Acts at the Doha and Istanbul Congresses." The Chamber does not believe this sufficiently responds to the Chairman's question and appears to conflict with the State Department letter to Rep. Marchant which is a part of PRC docket IM 2016-1.

While the UPU Constitution declares the obligatory nature of the UPU Convention, that provision does not appear to obviate the need for each country to give formal approval to be bound by each Convention as it is agreed. The U.S. ratified the UPU Constitution in 1965, but it did not thereby consent to be bound by all future UPU Conventions regardless of content. Nor did other UPU member countries. On the contrary, the UPU Constitution includes an approval procedure for each Convention.

² The proposed Inbound Letter Post rates are calculated based on either (1) the total weight of letter post or (2) the total number of items and weight of (A) documents and (B) small packets received from each country in each of the four UPU terminal dues groups. The Chamber would not object if the only data made publicly available is the data necessary to calculate revenues for these three rate categories aggregated at the terminal dues group level. USPS has also concluded Inbound Letter Post NSAs with five foreign post offices. To the extent that the rates, volumes, and revenues for these NSAs are included in the calculation of the price cap for FCM in USPS-LR-R2018-1/NP1, the Chamber submits that the appropriate data for each NSA should be made publicly available.

Article 25(4) states that approval "shall be governed by the constitutional regulations of each signatory country." Article 26 requires each member country to deposit instruments of approval with the UPU, so the UPU can inform member countries which countries are legally bound by provisions of the Convention. The U.S. has followed this procedure in the case of all UPU Conventions since 1964 up to the 2008 Convention. The U.S., like many other UPU members, has not deposited instruments of approval with the UPU for the 2012 or 2016 Conventions.

Under U.S. law, an international agreement cannot bind the U.S. unless it has been approved by the Secretary of State or in consultation with the Secretary.³ Further, once the Secretary or his delegate finally approves an international agreement and the U.S. becomes a party to the agreement, U.S. law requires the State Department to notify Congress⁴ and publish the agreement.⁵ It does not appear that either the 2012 or the 2016 UPU Convention has been approved in accordance with these requirements of U.S. law.

In short, having ratified the UPU Constitution, the U.S. is a member of the UPU and committed to support the mission of the UPU to facilitate international postal services. The Chamber supports this commitment. However, without certification the U.S. is arguably not a party to the 2012 UPU Convention and will likely not be a party to the 2016 UPU Convention when it comes into force on January 1, 2018, because the U.S. has thus far not approved the Convention in accordance with either the requirements of the UPU Constitution or U.S. law. In principle, the UPU Convention is a binding legal obligation only with respect to exchanges of mail between countries that have formally approved the Convention.⁶ With respect to other exchanges of mail, the

³ See 1 USC. § 112b(c) (2012 & Supp. IV 2016) ("Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement").

⁴ 1 USC. § 112b(a) (2012 & Supp. IV 2016).

⁵ 1 USC. § 112a(a) (2012 & Supp. IV, 2016).

⁶ USPS implies that the UPU Convention is binding with respect to flows of mail between parties of the Convention and UPU member countries who are not parties to the Convention. This is extremely doubtful.

UPU Convention serves, in effect, as an operational agreement that post offices have put into effect at their discretion. In implementing the UPU Convention, therefore, USPS must comply with U.S. law, absent formal approval of the Convention by both the Secretary of State (or his delegate) and the government of the country with whom the U.S. is exchanging mail.⁷

3 The proposition that Inbound Letter Post is fundamentally different from other First Class Mail products is implausible.

Finally, USPS implies that the Inbound Letter Post service is so fundamentally different from other First Class Mail (FCM) products that it is impossible to compare rates for delivery of Inbound Letter Post with a reasonable estimate of equivalent domestic postage. Nor is it possible to allow domestic mailers to access the Inbound Letter Post product if they tender similar postal items under similar conditions. Such claims seem questionable. While there may be marginal differences between the delivery services provided for Inbound Letter Post and other FCM mail, USPS is providing local delivery for similar documents and packages using the same facilities, personnel, and equipment. There is no escaping the basic conclusion that USPS is proposing to provide a similar delivery service to foreign mailers at lower rates than charged domestic mailers.

The Chamber recognizes that assessing the legality of the proposed rates for Inbound Letter Post raises somewhat novel issues. Nonetheless, the Chamber would emphasize that the nature of international postal service has changed fundamentally in recent years with the explosive growth of international e-commerce small packets. The effective discounts for delivery of inbound small packets are adversely affecting U.S. businesses, USPS finances, and, arguably, the rate increases for all other First Class

See Anthony Aust, *Modern Treaty Law and Practice* 227-31 (2013).

⁷ It is unclear, but doubtful, whether § 407(b) authorizes the Secretary of State to approve a UPU Convention which is inconsistent with US law. *Cf. Restatement (Third) of the Foreign Relations Law of the United States* § 115, comment (c) ("Congressional authorization to make an executive agreement that would supersede federal law is not be inferred lightly").

Mail products. The Chamber therefore urges the Commission to conduct whatever proceedings may be necessary to carefully evaluate and determine the legal and factual issues presented by these developments.

Respectfully submitted,



Sean Heather
Vice President
Center for Global Regulatory Cooperation

U.S. Chamber of Commerce
1615 H Street NW
Washington, D.C. 20062-2000
202 659 6000
SHeather@USChamber.com